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No. 76-1615

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHRISTOPHER ANDREW JOHNSTON, a MINOR, by ROBERT R. BRYSON AND BARBARA FAYE BRYSON, HIS GENERAL GUARDIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the applicability to this case of *Feres* v. *United States*, 340 U.S. 135, which precludes suits against the United States under the Federal Tort Claims Act for injuries to servicemen "where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

This is a wrongful death action brought under the Federal Tort Claims Act on behalf of the son of Air Force Captain Joseph Johnston. On December 10, 1971, while on active duty and driving from a class off-base to his government-assigned quarters on base, Captain Johnston had a head-on collision on the base with a car driven by Edward Sewar. Immediately prior to the collision, Sewar had consumed

intoxicating amounts of alcoholic beverages at the Base Exchange cafeteria. The complaint alleged that employees of the cafeteria sold alcoholic beverages to Sewar even though he was known to be intoxicated and thereby proximately caused the accident (Pet. App. B iv-v).

Captain Johnston was severely injured by the accident. He was medically retired from the United States Air Force on February 22, 1972, and subsequently died as a result of his injuries. He received military disability benefits and all other benefits which were payable by reason of his death, which was determined to have occurred in the line of duty (Pet. App. B viii n. 1).

Petitioner's guardians brought suit on his behalf under the Federal Tort Claims Act. The district court found that Captain Johnston was injured incident to service and granted the government's motion for summary judgment on the basis of *Feres* v. *United States*, 340 U.S. 135, which held that the Tort Claims Act does not permit recovery for such injury (Pet. App. B iv-x). The court of appeals affirmed (Pet. App. A ii).

The judgment of the court of appeals is correct, and does not warrant review by this Court. In *Stencel Aero Engineering Corp.* v. *United States*, No. 76-321, decided June 9, 1977, this Court reiterated that the Federal Tort Claims Act does not provide a cause of action for injuries to servicemen incident to active-duty military service. Contrary to petitioner's contention (Pet. 6-7), the congressional decision to exclude tort liability of this nature rests not only on a concern for the impact of such tort litigation on military discipline, but equally upon the "distinctively federal * * * character" of the relationship between the government and members of the armed forces, and the existence of "a statutory 'no fault' compensation scheme which provides generous pensions to injured servicemen,

without regard to any negligence attributable to the Government" (*Stencel Aero Engineering Corp., supra*, slip op. 5).[1]

Feres does not require, as petitioner urges, a finding that petitioner's suit would interfere with military discipline by pitting the serviceman against persons in his chain of command. The courts of appeals have repeatedly rejected this contention. *E.g., Hass for Use and Benefit of United States* v. *United States*, 518 F. 2d 1138, 1140-1141 (C.A. 4); *Henninger* v. *United States*, 473 F. 2d 814, 815-816 (C.A. 9), certiorari denied, 414 U.S. 819; *Hall* v. *United States*, 451 F. 2d 353, 354 (C.A. 1); see also *Shults* v. *United States*, 421 F. 2d 170, 172 (C.A. 5); *Harten* v. *Coons*, 502 F. 2d 1363, 1365 (C.A. 10), certiorari denied, 420 U.S. 963.[2]

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[1]Petitioner argues that application of the *Feres* rule to him violates the equal protection principles of the Fifth Amendment (Pet. 7-9). As the court of appeals noted (Pet. App. A iii), the classification in this case is one of service. The factors enumerated in *Feres, supra*, and *Stencel Aero Engineering Corp.* v. *United States, supra*, provide a rational basis supporting this classification. See *Dandridge* v. *Williams*, 397 U.S. 471, 485-486; *Weinberger* v. *Salfi*, 422 U.S. 749, 769-770.

[2]Petitioner contends that a conflict among the circuits exists because of the Sixth Circuit's decision in *Hale* v. *United States*, 416 F. 2d 355, 359-360, that a serviceman who was off the military reservation at the time of the injury had a cause of action under the Tort Claims Act. The issue whether *Feres* applies when the serviceman is off base is not presented by this case and the courts have been consistent in finding that *Feres* applies to cases where the serviceman, like petitioner, was not on leave and was on the military post when the injury incident to service occurred. Compare, *e.g., Coffey* v. *United States*, 455 F. 2d 1380 (C.A. 9), affirming 324 F. Supp. 1087, 1088 (S.D. Calif.), with *Mills* v. *Tucker*, 499 F. 2d 866, 868 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.